

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4187

NO. 77-4187

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

WINDHAM COMMUNITY MEMORIAL HOSPITAL
AND HATCH HOSPITAL CORPORATION,

RESPONDENT.

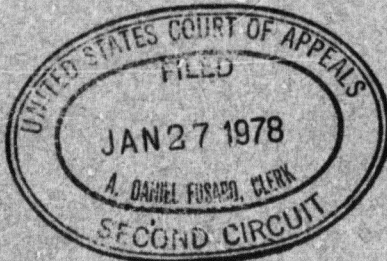
ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
WINDHAM COMMUNITY MEMORIAL HOSPITAL
AND HATCH HOSPITAL CORPORATION

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UNITED STATES COURT OF APPEAL
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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WINDHAM COMMUNITY MEMORIAL HOSPITAL AND
HATCH HOSPITAL CORPORATION,

Respondent.

BRIEF FOR WINDHAM COMMUNITY MEMORIAL HOSPITAL
AND HATCH HOSPITAL CORPORATION

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Hospital violated section 8(a)(5) and (1) of the Act by refusing to bargain with and withdrawing recognition from the Union.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Hospital's misconduct converted the Union's economic strike into an unfair labor practice strike.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board, pursuant to section 10(e) of the National Labor Relations Act, as amended, for enforcement of its order, issued on July 22, 1977, against Windham Community Memorial Hospital and Hatch Hospital Corporation. The Board's decision and order is reported at 230 NLRB No. 156. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred in Willimantic, Connecticut, within this judicial circuit.

STATEMENT OF FACTS

The facts in this case are not complicated. On August 7, 1975, an election was held at Windham Community Memorial Hospital and Hatch Hospital Corporation (hereinafter referred to as "the Hospital"), in which a majority of the employees voting selected the Connecticut Nurses Association as their collective bargaining representative by a vote of 38-19. On August 15, 1975 (A. 114)^{1/}, the NLRB certified a unit composed of all non-supervisory nurses at the Hospital.

^{1/} References to the Appendix in this matter appear as "A. ____"; references to the General Counsel's Brief on Appeal appear as "Pet.Br. ____"; Jt.Exh. ____ refers to the Joint Exhibits submitted during the hearing which are a part of the record herein and appear at Appendix 147 et seq.

1

MISSING BOARD

The Union and the Hospital commenced collective bargaining on November 6, 1975 (A. 113). On April 21, 1976, after several months of extensive bargaining, an agreement still had not been reached and the employees concerned walked out on strike in support of their economic demands. The parties continued to negotiate, and a number of items were resolved (A. 113). However, on June 9, 1976, the Union broke off negotiations, the parties having failed to agree on several important issues.

Approximately 57 employees engaged in the economic strike commenced on April 21st (A. 150-53; Jt.Exh. 2). Approximately 13 employees never went on strike (A. 150-53; Jt.Exh. 2). Additionally, 9 employees returned to work shortly after the strike commenced (A. 150-53; Jt.Exh. 2). At least 8 employees resigned on or before August 23, 1976, (A. 150-53; Jt.Exh. 2), a date which has further significance for the reasons set forth below. The Hospital began to replace the economic strikers almost immediately, and at least 42 replacements were hired during the course of the strike (A. 150-53; Jt.Exh. 2).

Other than a single request for accrued vacation pay for approximately 15 striking employees sometime in mid-July or early August (A. 58), there was no further word from the Union after it had left the bargaining table on June 9th

until the end of August. Picketing at the Hospital greatly diminished, and was eliminated by July and August (A. 27; 42; 49; 91-92). No bargaining sessions took place (A. 58). A large number of employees, both those who had refused to join the strike and those who had joined the strike but decided to return, made inquiries to Hospital officials about decertifying the Union (A. 51-52). Striker replacements also made such inquiries (A. 53). In addition, a large number of employees (no less than thirteen) volunteered to Hospital administrators and staff that they no longer supported the Union (A. 73; 74; 88-89; 90; 91-95). The Hospital also received requests for "references" from at least 15 employees who had engaged in the strike (A. 85). On August 6th, Erda Koehn, the president of the Union, announced that the strike and the picketing at the Hospital would cease (A. 49, 56, 59).

On August 23rd, Attorney Robert Snow, the chief negotiator for the Hospital, received a telephone call from Mary Lou Millar, the chief Union representative at the collective bargaining table. Ms. Millar indicated to Attorney Snow that as of that date there were only 23 nurses remaining on strike (11 part-time and 12 full-time) who wanted their jobs back. Ms. Millar stated to Attorney Snow that "if 23 people can have their jobs back, we will be

willing to meet", assuming that the Union "could get something to show for the strike" (A. 32; 34; 36; 38; 43; 46; see also Respondent's Exhibit 1 at A. 154). Attorney Snow stated that he would have to relay Ms. Millar's request to the Hospital, which he did later that morning by telephoning Frank Ritchie, Administrator at Windham. Mr. Ritchie's reaction was that the Union's conditioned offer to return to the bargaining table was unacceptable and "disappointing", particularly in light of similar conditions which the Union had imposed on the bargaining of June 9th and which had precipitated the breakdown in negotiations (A. 52-53; 57-58). Shortly after receiving the Union's preconditioned offer to return to the bargaining table, the Hospital announced that it was withdrawing recognition from the Union (A. 62).

No further communications took place between the Hospital and the Union subsequent to August 23rd, with the exception of a single request by a Union attorney sometime in September that 13 nurses still out on strike be offered reinstatement by the Hospital (A. 78-79). In October, the Connecticut Nurses Association filed a single unfair labor practice charge alleging that the Hospital was refusing to bargain with the Union in violation of section 8(a)(5) of the Act (29 U.S.C. §158(a)(5)).

On November 19, 1976, the Regional Director for the First Region issued a complaint and notice of hearing against the Hospital, alleging that the Hospital refused to bargain on August 23, 1976. A hearing was held before an Administrative Law Judge of the NLRB on March 15, 1977, who issued a decision on May 9, 1977, in which he made findings of fact and conclusions of law that the Hospital had in fact improperly refused to bargain on August 23rd in violation of the Act. The Board adopted the Administrative Law Judge's opinion with minor modification and purported to clarify Board policy with regard to the presumptions of Union support concerning striker replacements in an opinion dated July 22, 1977 (230 NLRB No. 156).

ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE FAILS TO SUPPORT THE BOARD'S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH AND WITHDRAWING RECOGNITION FROM THE UNION.

The Hospital does not dispute that it declined the Union's conditioned offer to return to the bargaining table on August 23rd, and also withdrew recognition from the Union on that date. The question presented, however, is whether either of those actions constituted a refusal to bargain within the meaning of Section 8(a)(5) of the Act. The

Hospital submits that they did not, and that there is insufficient evidence on the record as a whole to support such a finding. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); 29 U.S.C. §160(e).

A. The Hospital Had No Obligation To Accept The Union's Preconditioned Offer To Return To The Bargaining Table.

The rule is well settled that neither party to collective bargaining must accept a preconditioned offer to bargain. Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976); NLRB v. Pepsi Cola Bottling Co., 449 F.2d 824 (5th Cir. 1971), cert. denied 407 U.S. 910 (1972); Midwestern Instruments, Inc., 133 NLRB 1132, 48 LRRM 1793 (1961). See, National Licorice v. NLRB, 309 U.S. 350 (1940).

In Midwestern Instruments, Inc., supra, the Board held that an employer did not violate the National Labor Relations Act by refusing to negotiate with a Union which had preconditioned contract agreement on the reinstatement of striking employees who had lawfully been terminated for strike misconduct. The Board found the Union's precondition itself unlawful. 48 LRRM at 1796.

In Royal Typewriter Co. v. NLRB, supra, the Eighth Circuit Court of Appeals found that the employer had violated its duty to bargain with the Union by making an offer to

bargain preconditioned on the withdrawal by the Union of pending unfair labor practice charges the Union had filed with the Board. The employer also had preconditioned bargaining on Union agreement that the collective bargaining agreement then in effect be extended for sixty days. The Court of Appeals held that "[the] imposition of unlawful conditions on bargaining clearly violated sections 8(a)(1) and (5) of the Act [citations]." 533 F.2d at 1037. The Court went on to affirm the Board's finding that such conditions were in violation of the Act.

In the present case, although there is uncontroverted evidence in the record that on August 23rd the Union imposed a precondition on the resumption of collective bargaining, neither the Administrative Law Judge nor the Board made any finding with regard to the precondition. The record below is clear that early in the hearing, when questioned about her demand for reinstatement for 23 striking employees as a precondition to returning to the bargaining table, Union representative Millar had no recollection whatsoever (A. 20-21; 25-26). Attorney Snow, on the other hand, after Millar's inability to recall details of their conversation, testified at length concerning the precondition imposed by Ms. Millar and introduced into the record his contemporaneously taken notes of the August 23rd telephone conversation which indicated

that reinstatement for 23 employees was demanded (A. 32-33; 38-39; 154). The notes also indicated the further precondition that the Union "get something to show for the strike" (A. 154). Only near the end of the hearing, her recollection apparently refreshed by the testimony of Attorney Snow, did Mary Lou Millar recall in general terms the matter of reinstatement which she had raised. She admitted that the Union was "taking a very adamant position" with regard to any employee desiring reinstatement (A. 107).

In light of the fact that Attorney Snow's testimony with regard to the preconditions to bargaining was uncontroverted, it is difficult to imagine what basis, if any, the Administrative Law Judge had for concluding that during the August 23rd telephone call, Mary Lou Millar merely had stated "the formula by which the Respondent would take back the striking employees" (A. 114). In his brief to this Court, the General Counsel characterized Ms. Millar's offer as one "to make concessions regarding the number of striking employees who would return to work" (Pet.Br. 4). Even a generous reading of Ms. Millar's testimony fails to provide any basis for concluding that she had offered to make concessions. She did demand reinstatement for 23 employees, and she did state that the Union would have to have something to show for the strike.

The record reveals then, that on August 23rd, the Union made an offer to return to the bargaining table preconditioned on the reinstatement of 23 striking employees and preconditioned on getting something to show for the strike. These preconditions imposed by the Union were unlawful under sections 8(b)(2) and (3) of the Act. Royal Typewriter Co. v. NLRB, supra; NLRB v. Pepsi Cola Bottling Co., supra; Midwestern Instrument, Inc., supra.^{2/} The preconditions not only represented a refusal to bargain on the part of the Union, Midwestern Instruments, Inc., supra, but also constituted unlawful discrimination against the economic striker replacements who would have had to have been terminated. If the Union was the collective bargaining representative of a majority of all unit employees, as the Board presumes, then the Union owed a duty of fair representation to the striker replacements, too, which could not be

^{2/} At the very least, a factual and legal determination should have been made regarding the Hospital's evidence that preconditions to bargaining were imposed by the Union on August 23rd. As the evidentiary record in this matter now stands, there is uncontroverted testimony that preconditions were imposed by the Union and an admission by the Union that it was "very adamant" with regard to the issue of reinstatement (A. 107). Since a finding that unlawful preconditions were imposed by the Union would relieve the Hospital of at least one basis for finding a Section 8(a)(5) violation on August 23rd, there is no reasonable justification for the failure of the Board to resolve this issue. Cf. Speciality Restaurant Corp. d/b/a Candlestick Waterfront Restaurant Corp., 232 NLRB No. 48 (1977).

and was not subserved by demanding that 23 of them be fired.

B. The Hospital's Withdrawal of Recognition of August 23rd Was Based on a Serious Good Faith Doubt of the Union's Majority.

This Circuit has followed the general rule that a union which has been certified by the Board as the collective bargaining representative for a particular group of employees enjoys an irrebuttable presumption of majority status during the first year of certification, and a rebuttable presumption thereafter. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977); Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489 (2d Cir. 1975). See, Brooks v. NLRB, 348 U.S. 96 (1954); Orion Corp. v. NLRB, 515 F.2d 81, 85 (7th Cir. 1975); Celanese Corp. of America, 95 NLRB 664, 672 (1951). After one year, an employer may rebut the presumption of majority status in one of two ways: (1) by showing that on the date recognition was withdrawn the Union did not in fact enjoy majority support, or (2) by presenting sufficient evidence to show that the refusal to bargain was based on a serious good faith doubt of the union's majority. Retired Persons Pharmacy v. NLRB, *supra*; Nazareth Regional High School v. NLRB, *supra*; Orion Corp. v. NLRB, *supra*. The evidence which the employer presents must be "clear and

convincing." Retired Persons Pharmacy v. NLRB, supra; Orion Corp. v. NLRB, supra; NLRB v. Tragniew, Inc., 470 F.2d 669 (9th Cir. 1972). The Hospital maintains that on August 23rd, it had a sufficient basis for a good faith doubt that the Union represented a majority of its employees. The great weight of the evidence in the record below demonstrates that this is so, and provides an insufficient basis for determining otherwise.

1. The Hospital Had a Compelling Basis For a Good Faith Doubt.

A review of the record reveals that Windham Hospital had no fewer than eight separate bases on August 23rd for doubting that the Union still represented a majority of its employees, and which taken together, formed a compelling basis for withdrawing recognition. It is important to keep in mind that each of these bases was known to the Hospital on August 23rd, the date recognition was withdrawn. The courts uniformly have held that the time of the knowledge is crucial. Nazareth Regional High School v. NLRB, supra, at 880; Orion Corp. v. NLRB, supra, at 83.

First, on August 23rd, the Hospital was aware of diminished support and repudiation of the Union by all categories of employees affected: non-striking unit employees, unit employees who had returned to work, strike replacements

and strikers. Specifically, the Administrative Law Judge found that on August 23rd, the Hospital was aware that at least 15 unit employees never went out on strike (A. 150), and 9 other employees who had gone out on strike initially had returned to work before August 23rd (A. 151). The Union itself had indicated to the Hospital's chief negotiator on August 23rd that there were only 23 striking employees remaining who were still interested in their jobs (A. 32-33; 38-39). On the basis of numbers alone, then, and without regard to the more than 42 employees who had been hired as striker replacements (see below), there were at least 24 unit employees who were working at the Hospital, and only 23 unit employees still on strike who wanted their jobs back.

Second, the record herein reveals that by August 23rd, a significant number of employees had inquired of the Hospital about decertification, or otherwise had made voluntary statements to the Hospital indicating a rejection both of the strike and the Union. In this regard, there was uncontroverted testimony by the Director of Nursing that employees Hansele (A. 88; 95-96), Macauley (A. 88), Donnelly (A. 89-90), Tomko (A. 89, 95), Spencer (A. 89, 95), Neuharth (A. 89, 94), Monast (A. 89, 94), Haines (A. 90, 94), Vezina (A. 90), Litwak (A. 90, 93), Whalen (A. 90, 93), Marmen (A. 90-92), and Hochstetter (A. 90-92) all made statements

indicating a lack of support for the Union before August 23rd. Ten of these 13 employees who volunteered anti-union remarks were in the original unit, 3 were striker replacements (Whalen, Marmen and Hochstetter). Seven of the 13 represented more than half of the employees who never joined the strike (Donnelly, Haines, Litwak, Neuharth, Spencer, Tomko and Vezina). Three of the 13 represented employees who had joined the strike initially, but returned shortly thereafter (Hansele, Macauley and Monast).^{3/}

Third, by August 23rd, it had become apparent to the Hospital that there was a severe reduction and elimination of strike activity at the Hospital. The last pickets seen at the Hospital were in June, and by July and August all forms of strike activity had disappeared (A. 27; 42; 49; 91-92).

Fourth, although bargaining continued for little more than a month after the strike commenced, by August 23rd almost three full months had passed since any bargaining negotiations had taken place (A. 58). With a single exception, there was no word whatsoever from the Union during this extended period of time preceeding and following the lapse of the certification year on August 15th.

^{3/} At least several of these employees also had indicated to the Hospital in May or June that they were interested in decertification (A. 51-52).

Fifth, by August 23rd, the Hospital had received requests for job references with regard to at least 15 striking employees who apparently had obtained or were seeking jobs elsewhere (A. 61; 85). These calls for references were received directly by the Hospital administration or staff which kept accurate records of the references requested (A. 85; 150-53).

Sixth, eight unit employees who had gone out on strike submitted letters of resignation to the Director of Staff Nursing on or before August 23rd, indicating that they no longer wished to be employed by the Hospital (A. 84).

Seventh, on August 6, 1976, the president of the Union made a formal announcement that all picketing and other strike activity at the Hospital was being discontinued (A. 49; 56; 59). In fact, no picketing has since taken place at the Hospital (A. 92).

Eighth, on August 23rd the Union telephoned Attorney Snow and indicated that it would accept the final offer the Hospital had put on the table, provided 23 striking employees would be reinstated, and provided the Union could get something to show for the strike (A. 32-33; 38-39).

All of these factors collectively provided the Hospital on August 23rd with a sufficient objective basis

for doubting that the Union still enjoyed majority status. The courts have held that it is the "cumulative effect" of all the objective factors available to the employer at the time that recognition was withdrawn that should be considered in weighing the reasonableness of the employer's doubt. Star Manufacturing Co. v. NLRB, 536 F.2d 1192 (7th Cir. 1976); Royal Typewriter Co. v. NLRB, supra; NLRB v. Nu Southern Dyeing & Finishing, 444 F.2d 11 (4th Cir. 1971); Ingress Plasteen, Inc. v. NLRB, 430 F.2d 542 (7th Cir. 1970. It was the cumulative effect of the factors detailed above that provided Windham Hospital on August 23rd with a reasonable basis for its good faith doubt that the Union still enjoyed majority status.

Furthermore, as a matter of law, all of the Windham strikers, whether 42 or 23 in number, were no longer "employees" within the meaning of the Act on August 23, 1976. Section 2(3) of the Act defines "employee" as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute...." 29 U.S.C. §152(3) (emphasis supplied). The Board long ago held that where, as here, strikers' positions have been filled, normal operations have been resumed, and concerted strike activities have been discontinued, the labor dispute is no longer "current" and the strikers are no longer "employees." Standard Insulation,

22 NLRB 758 (1940). Neither Congress nor the Board has seen fit to change the statute or its interpretation since that decision.

2. The Presumptions Applied by the Board Were Invalid.

Considerable confusion has arisen in the last several years from the failure of the Board to apply the same presumptions in each case in which a withdrawal of recognition has been made.^{4/} See, Automated Business Systems, Inc. v. NLRB, 497 F.2d 262 (6th Cir. 1974); Orion Corp. v. NLRB, supra, at 84-85. Whatever presumption the Board may wish to impose, certainly the employer, at the least, must be given an opportunity to demonstrate that the presumption has been rebutted, not merely by proof of actual loss of majority support, but also by proof of a reasonable basis for good faith doubt of majority support. See, Nazareth Regional High School v. NLRB, supra; Retired Persons Pharmacy v. NLRB, supra; Orion Corp. v. NLRB, supra.

In the instant case, the Board indulges in the presumption that all categories of employees affected by the strike, including striking employees, non-striking employees

^{4/} See p. 22 infra.

and replacements, support the Union in the same ratio as they did on August 7, 1975, when the Union was voted in by a margin of two to one. Certainly, with regard to striking and non-striking employees who comprised the original unit, the Hospital believes that the cumulative effect of all the objective evidence available to it on August 23rd more than adequately rebuts the presumption of majority status. As noted above, by August 23rd, no fewer than 24 unit employees either had not gone on strike or had returned from the strike. By contrast, only 23 striking employees were demanding reinstatement on August 23rd, the others apparently having abandoned their employment.

It seems clear, then, that the Hospital had a reasonable objective basis to doubt the Union's continuing majority status, particularly in light of the additional objective factors of no picketing, no bargaining, repudiation of all strike activity by the Union and numerous voluntary statements from unit employees indicating a rejection of the Union. Of course, the employer did not know to a certainty^{5/} that the Union did not enjoy majority status, but the applicable rule requires only a reasonable basis for a good faith doubt. Nazareth Regional High School

^{5/} Ironically, the Hospital overestimated union support on August 23rd. In the weeks following, of the approximately 40 employees supposedly still out on strike, 13 abandoned employment, 12 submitted written resignations, and 13 returned to work (A. 150-53).

v. NLRB, supra; Retired Persons Pharmacy v. NLRB, supra.

With regard to the striker replacements, the Hospital does not believe that the Board's presumption that striker replacements supported the Union by a margin of two to one is either justified or correct. First, while the simple act of crossing a union picket line may not indicate rejection of the union, it reasonably cannot be held to be an indication of union support either. Second, the Board itself has held that there is no basis for the presumption that striker replacements support the union. Arkay Packaging Corp., 227 NLRB No. 59, 94 LRRM 1197 (1976), petition for review pending (2d Cir. No. 77-4194), sub nom New York Printing Pressmen v. NLRB. In Arkay, the Board held that the presumption applicable in the normal turnover situation is not applicable with regard to striker replacements. The Board stated:

"...it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements for the union employees who had gone out on strike favored representation by the union to the same extent as the strikers." 94 LRRM at 1198.

See also, People's Gas System, Inc., 214 NLRB 944, 947 (1974), cited with approval in Arkay.

The General Counsel's attempt to distinguish Arkay Packaging Corp. from the present case on the grounds that the union in Arkay abandoned the bargaining unit is not

convincing. The abandonment of the bargaining unit in Arkay was not apparent until several months after striker replacements had been hired and had been on the job. In any case, it is difficult to discern what possible effect the level of union activity would have.^{6/} Presumably, the sentiments that prompted the striker replacements to cross the union picket line in Arkay are indistinguishable from the sentiments that prompted (or allowed) the striker replacements to cross the union picket line at Windham Hospital. Moreover, as the Board itself held in Arkay, it is not unreasonable for an employer such as Windham to infer that the degree of union support among the striker replacements is either non-existent, or at least considerably weaker than the support of those on the picket line:

"There is, therefore, at least as much justification for not indulging in a presumption that the replacements favor the Unions and for finding that Respondent had reasonable grounds for not believing that to be so, as there is for finding, as we have, that it was reasonable for Respondent to question the continued union adherence of the striking employees." 94 LRRM at 1198.

See, People's Gas System, Inc., supra. Cf. Nazareth Regional High School v. NLRB, supra; Retired Persons Pharmacy v. NLRB, supra.

^{6/} In fact, a reasonable person might well conclude that a strike replacement's willingness to cross a picket line during a period of union dormancy is less indicative of his sentiments concerning the union than his willingness to cross a picket line when striking employees are manning the barricades.

Third, the Board's inconsistency with regard to this issue constitutes something less than the "principled adjudication" litigants and the public have a right to expect. See, NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Interestingly enough, the same Administrative Law Judge who was reversed by the Board in Arkay was reversed again by the Board in this case for relying on the Board's holding in Arkay with regard to strike replacements. 230 NLRB No. 156 (A. 126). If the NLRB's administrative law judges have difficulty discerning the applicable standard, then an intolerable burden surely is placed on the layman employer who believes he is acting reasonably under all the circumstances.

Finally, the Board's Brief misstates the law when it states "The standard of proof is indeed difficult for an employer to meet. The safer and preferred procedure for an employer wishing to challenge the union's continued majority is to petition the Board for a new election" (Pet. Br., p. 8, fn. 4). That used to be the "safer and preferred procedure", but the Board has more recently effectively taken that procedure away from employers. Now the Board treats an Employer's petition for an election exactly as it treats a refusal to bargain. The Employer must sustain the identical burden of proof in either instance. United States Gypsum Company, 157 NLRB 652 (1966); NLRB Casehandling Manual (Part Two), "Representation Proceedings", Sections 11042-11044 (October, 1975). The Board has also effectively deprived an

• employer of the ability to obtain evidence of employee
• sentiment. An employer must have objective evidence justifying a good faith doubt before it can even inquire into employees' sentiments for or against a union. Mid-Continent Refrigerated Service Co., 228 NLRB No. 98 (1977).

Thus, the Board has step-by-step built up a body of law which places the employer in an impossible "Catch-22" situation. The presumption of continued majority can be rebutted only by objective evidence of good faith doubt; an employer can seek an election only if it has objective evidence of good faith doubt; but an employer can seek out that objective evidence only if it already has objective evidence of good faith doubt. Since an employer who has a good faith doubt is forbidden to bargain with a union, a complete dilemma results. Even dissident employees cannot seek a decertification election while refusal to bargain charges are pending.^{7/}

This dilemma is entirely Board created and totally unnecessary. Congress provided a quick and simple remedy: a representation election. In an election, the sentiments of the 24 non-striking employees here could be established with certainty. The 42 replacement employees would have an opportunity to exercise their statutory right to vote for

^{7/} See the Tenth Circuit Court of Appeals' rebuke of this policy in its recent decision in Burns International Security Services, Inc. v. NLRB, F.2d ___, 82 L.C. ¶10,257 (10th Cir. No. 76-1754, December 23, 1977).

the first time. Those employees still on strike, if any, could demonstrate what interest they may or may not have in employment with the employer and in representation by the union. The opportunity for an election, foreclosed since August 23, 1976 to the Hospital and to dissident employees (but not to the Union), will be available again the instant this Petition for Enforcement is denied.

3. The Hospital Withdrew Recognition In An Atmosphere Free of Anti-Union Conduct.

This Court's recent decisions in Nazareth Regional High School v. NLRB, supra, and Retired Persons Pharmacy v. NLRB, supra, while instructive, do not preclude a finding that Windham Hospital had a reasonable basis for a good faith doubt as to the Union's majority status. In Nazareth, most of the objective factors relied upon by the employer did not come to the employer's attention at the time that recognition was withdrawn. As the court stated, "... many of the resignations from the union came after the refusal to bargain and thus cannot support Nazareth's claim of good faith doubt which has to be evaluated as of the time of the rejection of the union's recognition demand." 549 F.2d at 880. Moreover, the employer's withdrawal of recognition in Nazareth was accompanied by a series of pervasive unfair labor practices designed to undermine the union's support.

• Among other things, it was alleged that the employer had engaged in a change of administration to avoid the bargaining obligation, had refused to provide information to the union, had threatened employees with discharge, had discriminatorily discharged a union supporter, had circulated anti-union letters, and had encouraged a decertification petition among the employees. By comparison, throughout the bargaining history of the instant case, there has been not one allegation of discriminatory conduct, unlawful action designed to undermine the union's support, or a refusal to bargain in good faith, prior to the filing of the single Section 8(a)(5) charge arising out of a withdrawal of recognition on August 23rd.

Similarly, in Retired Persons Pharmacy v. NLRB, supra, it is clear that much of the evidence which the employer sought to introduce to justify its good faith doubt was information which became available only after recognition had been withdrawn. That employer, too, had engaged in a pervasive pattern of coercive and intimidating behavior designed to undermine the union's support: recognition was withdrawn before the end of the contract term, virtually every employee in the unit was interrogated at length, and a

unilateral reduction in the work week was instituted. Again, the withdrawal of recognition by Windham in the instant case took place in an atmosphere completely free of anti-union conduct, and was a result of this employer's good faith doubt based on all the factors tending to show that the Union no longer enjoyed majority status.^{8/}

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- 8 The Board adopted the Administrative Law Judge's finding that Hospital Administrator Ritchie determined to withdraw recognition before the end of the certification year and for improper subjective reasons (A. 116). The General Counsel implies that such was the case in its brief (Pet. Br. 13). This finding is not substantiated by the record, and the implication is unfair and prejudicial. First, the record is perfectly clear that a decision by the Hospital's Board that a withdrawal of recognition might be appropriate was not made prior to August 16th, after the certification year had lapsed (A. 64). The withdrawal itself was not made until August 23rd, after the union's preconditioned offer to return to the bargaining table was received by the Hospital (A. 52-53). Second, Mr. Ritchie's subjective state of mind was irrelevant, except to the extent that it "bolster[ed] the argument that . . . doubt existed at the relevant time". Orion Corp. v. NLRB, 515 F.2d 81, 85 (7th Cir. 1975) (emphasis supplied). Finally, nothing in Section 8(a)(5) prohibits an employer from being "discouraged" about the course of collective bargaining negotiations and it is rather fatuous of the Board to suggest that it was an indicator of bad faith. Given the preconditions imposed by the Union on August 23rd, about which the Union was as adamant (A. 107) as it had been on June 9th when such adamancy precipitated a breakoff in negotiations (A. 39), Mr. Ritchie probably was quite justified in being discouraged.

The evidentiary record established herein provides a compelling justification for the Hospital's withdrawal of recognition on August 23rd, and requires that the Board's finding to the contrary be found lacking in evidentiary support.^{9/}

II. THERE IS INSUFFICIENT RECORD EVIDENCE TO SUPPORT THE BOARD'S FINDING THAT THE HOSPITAL'S ALLEGED MISCONDUCT CONVERTED THE ECONOMIC STRIKE INTO AN UNFAIR LABOR PRACTICE STRIKE.

The Hospital accepts the Board's articulation of the rule with regard to the conversion of an economic strike into an unfair labor practice strike. "Where a strike which initially involved no unfair labor practice is prolonged or aggravated by an employer's unfair labor practice....," the strike becomes an unfair labor practice strike. General Teamsters, Local 992 v. NLRB, 427 F.2d 582, 587 (D.C. Cir. 1970), quoting NLRB v. Remington Rand, Inc., 130 F.2d 919,

9 There is persuasive authority for the proposition that once the employer has met his burden of rebutting the presumption in favor of continued majority status, the employer may not be found guilty of committing a section 8(a)(5) violation even if the union in fact represented a majority of the employees. NLRB v. Dayton Motels, Inc., d/b/a Holiday Inn of Dayton, 474 F.2d 328, 331-332 (6th Cir. 1973); Arkay Packaging Corp., 227 NLRB 59, 94 LRRM 1197, 1198 (1976). The rule makes sense, since the possession of good faith doubt is an alternative to showing no majority support in fact. Cf. Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489 (2d Cir. 1975); Nazareth Regional High School v. NLRB, 549 F.2d 873, 880 (2d Cir. 1977).

929 n.8 (2d Cir. 1942) (emphasis supplied). It has also been held that "[O]nce it is shown that an employer's unfair labor practice is a significant factor in the strike, the burden is 'on the company to show that the strike would have continued even if it had [not committed an unfair labor practice].'" General Teamsters, Local 992 v. NLRB, supra (emphasis supplied).

However, given that the foregoing rules are applicable, it at once becomes apparent upon reviewing the record herein that not one single fact was adduced by Counsel for the General Counsel at hearing which would show, or even tend to show, that the alleged unfair labor practice committed by the Hospital on August 23 either "prolonged or aggravated" the strike supposedly thereto, or was "a significant factor" in the strike. The General Counsel's brief is notably barren of any reference to the record which would substantiate a finding that this strike was ever converted into an unfair labor practice strike (Pet.Br. 15).

In fact, it appears from the face of the Administrative Law Judge's opinion that the Administrative Law Judge considered all evidence subsequent to August 23rd to be "not relevant" (A. 114). And during the hearing itself, Counsel for the General Counsel indicated that post August 23rd evidence concerning unit employees was "irrelevant" (A. 6).

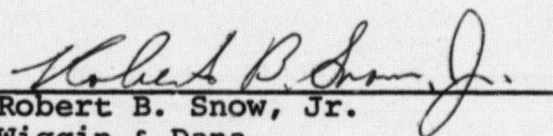
Accordingly, in the total absence of any evidence in the record indicating that a strike was in progress on or after August 23rd, much less that a strike was prolonged or aggravated by the Hospital's alleged unfair labor practice, that portion of the Board's order seeking reinstatement and back pay should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully requested that a judgment be entered denying the Board's order in full.

Respectfully submitted,

By


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

V.

WINDHAM COMMUNITY MEMORIAL HOSPITAL
AND HATCH HOSPITAL CORPORATION,

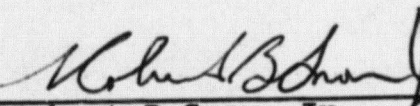
Respondent.

NO. 77-4187

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the Respondent's
brief have this day been served by first class mail upon the following
parties at the address listed below:

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Robert B. Snow, Jr.

Dated at New Haven, Connecticut
this 25th day of January, 1978.